85-345 (1)

NO. 84-1399

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1985

Ernest Allen,

Petitioner

v.

City of Kinloch,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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27 pp

QUESTIONS PRESENTED

When a Police Officer of a municipality, following City established procedures and without a search warrant, and without a pre-deprivation hearing, takes and removes motor vehicles of a citizen from his home, such removal not being first time, is the citizen barred from suing the municipality under 28 U.S.C. 1983 when he has a State remedy by reason of its replevin laws (post-deprivation hearing), which returns the property and affords him limited damages for its return?

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IN THE SUPREME COURT OF
THE UNITED STATES

ERNEST ALLEN

Petitioner,

v.

CITY OF KINLOCH

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF
APPEAL FOR THE EIGHTH CIRCUIT

ERNEST ALLEN, by and through his attorney, Louis S. Czech, petitions herein for a Writ of Certiorari to review the Decision of the Court of Appeals of the State of Missouri, which reversed a jury decision of the Eastern District of Missouri, United States District Court.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals has not formalized

its opinion. Its opinion and judgment are reprinted in the Appendix B. hereto on page 12 .

Ernest Allen v. City of Kinloch, ____F(2)_____ (No. 84-1399 EM) 8th Cir. filed May 31, 1985.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on the 31st day of May, 1985, a timely petition for rehearing was denied. The jurisdiction is invoked under 25 U.S. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution. Search and Seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution: Section 1. Citizenship rights not to be abridged by states.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 16, 1983, the plaintiff-owned occupied as his home certain real estate in the City of Kinloch, St. Louis County, Missouri. He and his family had occupied this land since approximately 1923. He was in the trucking business as was his father before him. On this day in July the City of Kinloch Police were taking and removing three of his trucks that were parked on his real estate. The Police of the City of Kinloch had previously taken motor vehicles from his property. After the taking and removing of his trucks on July 16, 1983, the Police came back several weeks later to take additional vehicles, but the plaintiff objected and they did not remove any vehicles at that time.

Such removal and taking was done

without a warrant or other legal process. The trucks were kept and retained by the City until the plaintiff filed his suit against the City under 28 U.S.C. Section 1983 for damages.

At the time of taking the plaintiff arrived home and objected to the taking. He was arrested, handcuffed, and taken to the Police station, but released after being held for several hours without any charges being filed.

He received four traffic tickets from the Police--two for failure to have a City license--one for failure to have a State inspection--one for improper registration.

The City had established procedures to order motor vehicles to be removed from one's property without a pre-deprivation hearing. If the motor vehicles were not removed the Police would remove

the items without a warrant or other legal process.

The matter was submitted to a jury in the District Court which returned a verdict for plaintiff for $3,000.00.

The City appealed the jury verdict to the Eighth Circuit, which reversed the jury verdict. The Appeals Court stated in reversing the jury verdict that:

> Parrott v. Taylor 451 U.S. 527 (1980), and
>
> Hudson v. Palmer 104 S. Ct. 3194 (1984) decisions hold that where a random and unauthorized act by a State employee results in a tortious taking of private property, due process is satisfied if State tort law provides a meaningful post-deprivation remedy.

The Appellate Court further stated that the Missouri Court provided an adequate remedy by way of replevin.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition in order to settle the question as to whether a State afforded remedy of replevin (post-deprivation) is an adequate protection for violation of a person's Constitutional Fourth Amendment and Fourteenth Amendment rights.

In the case at bar plaintiff was the owner of a truck which was parked on his property and which he used in his livelihood to support himself and family. The trucks were taken off his property without a warrant or other legal process. No hearing, prior or after the vehicles were taken was provided to him. The taking of his motor vehicles is

equally important as the taking of one's driver's license. Bell v. Burson 402 U.S. 535,91 S. Ct. 1586 (1971). It is equal to what this Court condemned in Fuentes v. Shevin 407 U.S. 67, 92 S. Ct. 1983 (1972) where a Florida replevin statute was struck down for allowing writs to be secured in ex parte proceedings. No pre-hearing was afforded in these cases. In Missouri the replevin law only allows relief after the fact and not before.

This Court has recognized post-deprivation remedies as providing and satisfying the due Process clause. Such cases involving post-deprivation remedies, however, seem to recognize that post-deprivations are valid if there is a necessity of quick action or the impracticality of providing any meaningful pre-deprivation process. In this

case, there was no necessity of quick action nor was it impractical to provide a pre-deprivation hearing. The motor vehicles were on private property and as ticketed, it is alleged they were in violation of license requirements which requirements are not required for vehicles that are on private property only when they are driven on the public streets.

In this case, more than property rights are involved--right to earn a livelihood--right to be secured in one's home.

The Eighth Circuit stated that a post-deprivation hearing by way of a replevin suit provided an adequate state remedy. This would require an expenditure of funds by plaintiff.

It is suggested to the Court that the Eighth Circuit opinion is in error in that there was no immediacy to protect

the public or traffic flow continuity and therefore a pre-deprivation hearing should have been given.

This decision, if it is allowed to stand, will allow the Police in Kinloch to go to one's property and take and remove the citizen's property no matter what it might be, all in violation of the Fourth and the Fourteenth Amendment. The decision of the Eighth Circuit approves and establishes a procedure that is likened to a Police State. This action by the Kinloch Police was not a random act but was a continuing procedure utilized by the City of Kinloch. These procedures are unlawful, intentional and illegal, and not just negligence and an adequate hearing preceding the deprivation could and should be established before a person's home is searched and property seized therefrom. Such State remedy

(replevin) would not keep the plaintiff from discriminatory treatment and does not provide him with an adequate remedy. Such action by the Police could continue on and on and plaintiff's only relief would be a replevin suit and such post-deprivation hearing is not appropriate in light of the city's action.

If a pre-deprivation hearing is not required, the police are given an unbridled authority to come on a citizen's property and remove whatever they want subject only to post-deprivation hearing by way of replevin. Such relief would not be a deterent to such raids by the Police. The Police would be encouraged to search and seize if a replevin suit is the only remedy a citizen has.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari or in the alternative, that the opinion and Order of the Court of Appeals of the Eighth Circuit, State of Missouri, be summarily reversed; or such other and further relief as to this Honorable Court may appear appropriate.

RESPECTFULLY SUBMITTED this 27 day of August, 1985.

LOUIS S. CZECH
Attorney for Petitioner
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Clayton, Missouri 63105
(314) 863-4020

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

NO. 83-1950 C(5)

ERNEST ALLEN,

Plaintiff
Appellant

v.

CITY OF KINLOCH

Defendant
Appellee

We the jury find in favor of Ernest Allen. We the jury assess the damages of plaintiff Ernest Allen as follows. For actual damages $3,000.00.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1399

Ernest Allen,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
v.	*	Court for the Eastern
	*	District of Missouri.
City of Kinloch,	*	
	*	
Appellant.	*	

Submitted: November 13, 1984

Filed: May 31, 1985

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

The City of Kinloch appeals from the district court's entry of judgment on a

jury verdict awarding Ernest Allen $3,000.00 in compensatory damages on a civil rights claim he had brought against the city under 42 U.S.C. § 1983. For reasons to be stated, we reverse.

Allen's claim, which alleged violation of his procedural due process rights, stemmed from an incident in which Kinloch police had had three of his trucks towed off property he owned or occupied. The trucks were towed on July 16, 1983, and were held by Ed Erp's Automotive Center, apparently on instructions from the police department, until January, 1984. According to Allen, he received no hearing or pre-towing notice. Allen further alleged that Kinloch police had once without warning towed several of his son's vehicles from the same premises, and had never

returned them. Allen testified that on another occasion police had threatened to tow other of his trucks which he had parked on the property. Testimony elicited by Allen's attorney indicated that tickets and twenty-four hour removal notices completed by the police in connection with the towings had cited non-existent ordinances and had referred to different trucks than those ultimately towed.

It is important to an understanding of the issues before us on appeal to clarify the nature of the claim Allen presented at trial. Allen presented little or no evidence regarding procedures the City normally afforded owners of towed vehicles; nor did he present rebuttal evidence when City officials testified that the City provided vehicle owners

hearings in towing situations.[1] Instead, Allen's evidence focused on how he and other members of his family had been treated by police, and whether the trucks had been parked on his property or on the City's property. In short, as the jury instructions reveal, Allen's claim, rather than being an attack on the facial validity of any established procedures or policies Kinloch might have had, was instead that police had abused their authority by arbitrarily seizing his trucks.

---

[1]The mayor of Kinloch testified that hearings were afforded in towing situations. Several tickets which Allen admitted having received on the day of the towings were admitted into evidence; on them, the notation "7-26-83" appears in blocks captioned "court date." There is no indication that Allen appeared or sought to appear on July 26, 1983 or any other date.

From a reading of the jury instructions, we assume the jury concluded that the towings had been improper, and that police had intentionally or knowingly exceeded their authority in arranging for the trucks to be towed. Nevertheless, "[n]othing in the [Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'" Parratt v. Taylor, 451 U.S. 527, 537 (1981), quoting Baker v. McCollan, 443 U.S. 137, 145 (1979). The constitutional issue here is what process was due Allen. It appears settled that municipalities authorizing towing of illegally parked cars are not required by the Constitution to establish pre-deprivation notice and hearing procedures. Breath v. Cronvich, 729 F.2d 1006, 1010 (5th Cir.), cert. denied, 105 S. Ct. 332 (1984); Sutton

v. City of Milwaukee, 672 F.2d 644, 646 (7th Cir. 1982). Further; given Allen's essential claim here that the police department ordered the towings as a deliberate or reckless abuse of authority, the City could hardly be expected to have procedures in place which would automatically afford Allen a remedy. See Parratt v. Taylor, 451 U.S. 527, 541 (1980); Hudson v. Palmer, 104 S. Ct. 3194, 3203 (1984). Due process does require that Allen have had, at a meaningful time and in a meaningful manner, an opportunity to challenge the seizure of his property. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). In this connection, however, the Supreme Court has held that, where a random and unauthorized act by a state employee results in a tortious taking of private property, due process is satisfied if state tort law provides a meaningful

post-deprivation remedy. Parratt v. Taylor, 451 U.S. 527 (1980); Hudson v. Palmer, 104 S. Ct. 3194 (1984). See also Hubenthal v. County of Winoma, 751 F.2d 243 (8th Cir. 1984).

In Missouri, a person claiming the right to possession of personal property wrongfully detained by another may bring an action in replevin. Mo. R. Civ. P. 99.01 (1983). If the court or jury finds the plaintiff in such an action is entitled to possession of the property, a judgment issues for the return of the property or the value of the property (at the prevailing party's option), and for damages assessed for the taking, detention or injury. Mo. R. Civ. P. 99.12. We see no reason to suppose Allen could not have obtained adequate relief for the taking of his trucks in a replevin action. Cf. Hudson v. Palmer,

104 S. Ct. at 3204 (1984) (fact that § 1983 plaintiff might recover less in state tort action does not mean tort remedy is inadequate). Accordingly, we must hold that Allen failed to establish any violation of his constitutional rights.

In view of our disposition of this case, a "motion to strike" which the City filed following oral argument on this case is dismissed as moot. The judgment of the district court is reversed and the cause is remanded for entry of appropriate judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

§ 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CERTIFICATE OF SERVICE

I, Louis S. Czech, counsel of record for Ernest Allen, petitioner herein, hereby certify that on 27 day of August, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals on each of the parties herein, as follows:

On the City of Kinloch, respondent herein, by depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of Bussey & Jordan, the above-named respondent's counsel of record, at 721 Olive Street, Suite 515, St. Louis, Missouri 63101.

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

Dated this 27 day of August, 1985.

LOUIS S. CZECH
Counsel for Petitioner

85-345

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1399

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ERNEST ALLEN,

Petitioner,

v.

CITY OF KINLOCH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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NO. 1399

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

ERNEST ALLEN,

Petitioner,

vs.

THE CITY OF KINLOCH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to the authority in Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the City of Kinloch, requests this to court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

OPINIONS BELOW

The opinion of the Eighth Circuit

Court of Appeals has not formalized its opinion.

STATEMENT OF THE CASE

The statement of the case as given by the petitioner should be disregarded by the Court, since it is a distortion of the facts and clearly was not used in evidence in the case at bar. The respondent shall give the true facts of the case by citing to the transcript and the lower courts findings to give the true facts of the case.

Petitioner, Ernest Allen, owned four trucks (Tr. 1-72) which he stored on property next to his home in the City of Kinloch (Tr. 1-75). On July 16, 1983, none of the petitioner's trucks stored on the lot had proper and complete state licenses (Tr 2-39, 2-81)

or city sticker registration (Tr. 2-39, 2-81). The latest registration on the vehicles were several years old (Tr. 2-39). The trucks were stored on an open and vacant lot (Tr. 1-75, 2-39, 2-60, 2-80), which was owned by the City of Kinloch (Tr. 2-163) and located next to property owned by Ernest Allen (Tr. 2-160). All of the trucks in question were derelict vehicles (Tr. 2-40, 2-60, 2-82).

On or about June 4, 1983 the Health Commissioner of the City of Kinloch, Mr. William Palmer (Tr. 2-19), personally gave notice to petitioner, Ernest Allen, at his home, (Tr. 2-21, 2-24) that the derelict trucks and trash near the trucks (Tr. 2-20) created a nuisance, a threat to health and safety (Tr. 2-24) and should be removed by him. Mr. Palmer had noticed

the trucks in violation of city ordinances on the property for at least four months (Tr. 2-30) prior to him giving the petitioner his first notice (Tr. 2-21, 2-30).

Shortly after the first notice for removal of the vehicles was posted, Mr. Palmer gave a second verbal notice to the petitioner that he must remove the vehicles (Tr. 2-24). Again on June 13, 1984 he gave notice to the petitioner (Tr. 2-23). After these repeated warnings of violation and continued non-compliance by the petitioner (Tr. 2-27), Mr. Palmer wrote a letter on June 28, 1983 to the police department (Tr. 2-26, Def. Ex. G.), advising them of the matter. (Def. Ex. H.) Mr. Palmer had no further involvement with the Petitioner, Ernest Allen, or the vehicles following the advisement to

the police (Tr. 2-31).

On or about July 9, 1983, a police officer of the City of Kinloch placed vehicle removal notices on the trucks on the vacant lot. (Tr. 2-50). The notices required the trucks, which were in violation of the law (the trucks did not have valid city or state licenses) to be removed within 24 hours. (Tr. 2-51, 2-69). Further, the notices stated that the owner's failure to remove the vehicles from the property could result in the City removing the vehicles (Tr. 2-52, 2-69).

The petitioner had testified that he had received the summons on July 16, 1983 pertaining to the violations, and was to appear in court on July 26, 1983 (Tr. 1-106).

On or about July 16, 1983, Officers Guybert Barnes and James Thomas of the

Kinloch Police Department (Tr. 2-37, 2-58) routinely checked the bulletin board to see if there were any outstanding car removal notices (Tr. 2-59). The officers found petitioner, Ernest Allen's trucks still in violation on city property (Tr. 2-38) after ample time had been given for the owner to remove them (Tr. 2-65). After investigation of the property and the actual viewing of the trucks in violation and with posted notices, the officers ordered and requested Ed Erp's Automotive Center to remove the vehicles in violation with the posted notices (Tr. 2-41, 2-62). The officers did not act under the express or implied authority of the Captain of Police (Tr. 2-109), the Mayor of Kinloch (Tr. 2-132), nor the Board of Aldermen (Tr. 166, 2-169).

Only those trucks in actual violation (Tr. 2-38, 2-60), on city property (Tr. 2-34; 2-60, 2-81, 2-89, 2-158, 2-159) and with notice of removal and violation (Tr. 2-38, 2-26) were towed on July 16, 1983. Vehicles not in actual violaton and without notice were not towed. (Tr. 2-68).

While in the process of towing the petitioner's vehicles, the petitioner appeared on the scene (Tr. 1-83) and blocked the exit passage-way with his automobile (Tr. 1-83). After numerous requests by the police officers to move his vehicle (Tr. 1-83, 2-63), the petitioner refused (Tr. 1-84). Subsequently, he was arrested for interfering with the duties of a police officer (Tr. 1-84). The trucks remained at Ed Erp's until the petitioner picked them up on or about

January 16, 1984 (tr. 1-94). The petitioner has testified that he suffered no loss of business during the trucks impoundment.

REASONS WHY WRIT SHOULD NOT BE ISSUED

The Court should not issue a Writ of Certiorari to settle a question of law that has already been decided by this Court and reaffirmed many times. The actions of the respondent, City of Kinloch were in accord with the Constitution of the United States and the law as set forth by the Supreme Court of the United States. The decision of the Eighth Circuit Court of Appeals was clearly in accord with the applicable law set down by this Court.

Petitioner, Allen, alleges the question presented to be

> "When a Police officer of a municipality, following city established procedures and

> without a search warrant, and without a pre-deprivation hearing, takes and removes motor vehicles of a citizen from his home, such removal not being first time, is the citizen barred from suing the municipality under 28 U.S.C. 1983 when he has a state remedy by reasons of its replevin laws (post-deprivation hearing), which returns the property and affords him limited damages for its return."

However, this is not the proper issue before the Court nor was it raised before any of the lower courts. Petitioner has greatly exaggerated the facts and nature of this case. Petitioner's framing of the question presented is in violation of Supreme Court Rule 21 in that the question is not expressed in the terms and circumstances of the case, but contains untrue statements. Moreover, it violates Rule 21 in that it is extremely argumentative and does not fairly set forth the issues of the

case.

Petitioner's question is in error and these errors shall be addressed seriatim: 1) "Allen presented little or no evidence regarding procedures the City normally afforded owners of towed vehicles; nor did he present rebuttal evidence when City officials testified that the City provided vehicle owners hearings in towing situations." (Eighth Circuit Court of Appeals Opinion, p. 2); 2) there was never an issue that the derelict trucks were removed from his property without a warrant; 3) there was no finding that the derelict trucks were removed from his property, in fact collaborated evidence showed that the open and vacant lot was City property (Tr. 2-160), 4) Allen was not barred from suit under 28 U.S.C. 1983, the 8th

Circuit held that "Allen failed to establish any violation of his constitutional rights; and 5) the damages are not limited under the Missouri replevin laws.

The only question that was before the lower courts and correctly answered by the Eighth Circuit Court of Appeals is "What process was due Allen". (Eighth Circuit Court opinion, p. 16).

At the outset it is important to note that the sole defendant in this action was the City of Kinloch, the individual police officer was not sued. In this regard, this Court has held in City of Oklahoma City v. Tuttle, _____ U.S., _____, 105 S.Ct. 2427, 2436 (1985), that a City policy may not be inferred from the single unconstitutional act of a police officer. To allow such an inference

would be to allow a:

> Section 1983 petitioner to establish municipal liability without submitting proof of a single action taken by a municipal policy maker. The * * * origins of Monell's "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decision makers.

Id. at 2435.

As stated by the Eighth Circuit, Allen did not present any evidence that the action taken was City policy. In fact he failed to rebut the City's evidence that vehicle owners are provided a hearing in towing situations. Therefore, the petitioner failed to meet his burden of proof as to the "policy or custom" of the municipality being unconstitutional, as required by Monell v. Department of

Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978), thus the decision of the Eighth Circuit should not be examined further.

Although the Eighth Circuit could have reversed the lower court's judgment on the basis of petitioner's failure to meet his burden of showing the City of Kinloch's "policy or custom" was unconstitutional, the Court went further to hold that the act irregardless of policy was not unconstitutional. The Eighth Circuit's reasoning is sound and in line with holdings of The Supreme Court of the United States and the holdings of other Circuits.

The question of "what process is due" has been answered many times by this Court. It is a question that has been answered generally and

specifically on a variety of fact patterns. It is perhaps the most answered questioned by this Court. The answer given has been consistently the same.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976). The court in Matthews held that in determining the type of hearing required, there must be a consideration of three distinct factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards, and (3) the government's interest,

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

If in fact an employee did act beyond his scope of power there was no violation of procedural due process. It appears settled that municipalities authorizing towing of illegally parked cars are not required by the constitution to establish pre-deprivation notice and hearing procedures. Breath v. Cronvich, 729 F.2d 1006 (5th Cir. 1984); Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982). Moreover, Missouri has a state remedy of post-deprivation hearings by way of a replevin suit to persons who have suffered a tortious loss at the hands of the state. Rule 99.01 of the Missouri Rules of Civil

Procedure, as amended 1983. Such procedures would fully compensate petitioner for his property loss and are sufficient to satisfy the requirements of due process. This Court has reviewed this procedure in Hudson v. Palmer, 104 S.Ct. 3194 (1984) the Court held among other things that: an unauthorized intentional deprivation of property by the state did not constitute violation of the due process clause because meaningful post deprivation remedies for the loss of property were available under state law. Also in Parratt v. Taylor, 451 U.S. 527 (1980), the respondent brought an action in federal district court under 42 U.S.C. Section 1983 against prison officials to recover the value of hobby materials, claiming that petitioners had negligently lost the

materials and thereby deprived, respondent of property without due process of law in violation of the Fourteenth Amendment. The Court held that respondent did not state a claim for relief under 42 U.S.C. Section 1983. The Court pronounced that: (a) in any section 1983 action the initial inquiry must focus on whether the two essential elements to a section 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States; (b) secondly, if respondent has been deprived of property under the color of state law, he has not sufficiently alleged a violation of the

Due Process Clause of the Fourteenth Amendment since the deprivation did not occur as a result of some established state procedure. More importantly, the Court held that respondent could have fully been compensated for such loss, under the state's tort claims procedure which provides a remedy to persons who have suffered a tortious loss at the hands of the state, but as in the present case, the respondent in Parratt failed to use such procedure.

In Parratt the Court reasoned that where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure the state cannot predict when the loss will occur. Under the circumstances, the court observed:

> It is difficult to conceive of how the City could provide a meaningful hearing before

> the deprivation takes place. The loss of property, although attributable to the state as action under "color of law" is in almost all cases beyond the control of the state. Indeed in most cases it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation.

Nevertheless, nothing in the Fourteenth Amendment protects against all deprivations of life, liberty, or property by the state. The Fourteenth Amendment protects only against deprivations without due process of law. The decisions in Parratt and Hudson held that where a random and unauthorized act by a state employee results in a tortious taking of private property, due process is satisfied if state tort law provides a meaningful post-deprivation remedy.

In Missouri, a person claiming the right to possession of personal

property wrongfully detained by another may bring an action in replevin. Rule 99.01, Missouri Rules of Civil Procedure (1983). If the court determines the petitioner in such an action is entitled to possession of the property, a judgment issues for the return of the property (at the prevailing party's option), and for damages assessed for the taking, detention or injury. Rule 99.12, Missouri Rules of Civil Procedure (1983). There is no reason why petitioner could not have obtained adequate relief for the taking of his trucks in a replevin action. Hudson v. Palmer, 104 S.Ct. 3194 (1984), (fact that Section 1983 petitioner might recover less in state tort action does not mean tort remedy is inadequate).

In fact as noted by the Eighth

Circuit, the petitioner, Allen, was afforded the opportunity to be heard in two ways. First, the petitioner was given a removal notice and court summons to appear in court on "July 26, 1983" (as noted by the court there is no indication that petitioner appeared or sought to appear in court on that date). Secondly, petitioner could have obtained adequate state relief by action of replevin in the Missouri courts. Ruel 99.01, Missouri Rules of Civil Procedure (1983).

In summary, a Writ of Certiorari should not be granted in this case due to 1) petitioner's failure to frame a proper question before this Court, 2) petitioner's failure to prove any action taken against him was done as a "policy or custom" of the respondent, City of Kinloch, 3) petitioner was

granted "due process" in that he had the opportunity to be heard in a meaningful time and place in two separate ways (a) by appearing July 26, 1983 in the respondent's court and (b) by bringing a suit of replevin in the courts of Missouri and 4) the decision of the Eighth Circuit Court of Appeals is clearly in line with the decisions of this Court and is similar to the holdings of the other circuits.

CONCLUSION

For the reasons heretofore stated above, the respondent, City of Kinloch requests this court to deny the petitioner's Writ of Certiorari, and that the opinion and order of the Court of Appeals of the Eighth Circuit be affirmed.

Respectfully submitted,

BUSSEY & JORDAN

By Lloyd J. Jordan
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CERTIFICATE OF SERVICE

I, Lloyd J. Jordan, counsel of record for the City of Kinloch, Respondent, hereby certify that on the 11th day of October, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on Louis S. Czech, 7912 Bonhomme, Suite 404, Clayton, Missouri 63105 mailed first class, postage prepaid.

BY Lloyd J. Jordan
LLOYD J. JORDAN

85-345 (3)

Supreme Court, U.S.
FILED
OCT 25 1985
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NO. 84-1399

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1985

ERNEST ALLEN,

Petitioner,

v.

CITY OF KINLOCH,

Respondent.

REPLY BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF

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EDITOR'S NOTE

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NO. 84-1399

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ERNEST A[illegible]EN,

Petitioner,

vs.

THE CITY OF KINLOCH,

Respondent.

PETITIONER'S REPLY BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF

Pursuant to the authority in Rule 22 and in the manner provided by Rule 33 and 34 of the Supreme Court Rules, the Petitioner,

Ernest Allen files this his reply brief in opposition to the Respondent's brief.

STATEMENT OF THE CASE

The Respondent has raised certain points that Appellant is required to deny and respond thereto. The statements in the Appellant's brief as to distortions and implications that Appellent's facts are untrue is the same methodology that it attempted to use in the jury trial. It should receive the same benefits by this Court as given by the jury.

The first red herring it throws into the case is some veiled statement of ownership of property on which the Plaintiff resided with his family since 1926. A deed was introduced and testimony by the Plaintiff (TR 1-80) and old time neighbors (TR1-118) and payment of taxes (TR1-80) as to the Plaintiff ownership and occupancy of this real property since

1924 (TR 1-69).

The City attempted on the day of trial to secure a survey, but to no avail (TR2-156). This issue was submitted to the jury by Instrument No. 5.

> "First: The defendant City of Kinloch, acting by and through its agents and employees did enter upon land occupied by Plaintiff and did tow and impound three trucks owned by Plaintiff which they had no legal right to do."

The jury found therefore this issue in Plaintiff's favor.

The second red herring in Respondent's brief is the issue of taking Petitioner's vehicles from his property without legal authority.

The City attempts now as it did before the jury to say that Petitioner's vehicles were derelict and violated a law. They didn't say and have never said what law Petitioner violated. On a notice put on

Petitioner's vehicle by the City it stated that ordinance 62 was violated. The City does not have and never had such an ordinance (TR3-30). It has no ordinance that makes it unlawful to park vehicles whether City-licensed or not on private property. As a matter of fact, such an ordinance would be illegal....City of Frankford v. Davies 348S.W.(2) 53:

> ".....the only motor vehicle license tax permissible (to be enacted by a city) is one against the owner of a motor vehicle who must be a resident of the city and who uses or operates said motor vehicle within the city....."

To store a motor vehicle on ones property is not a permissible city regulation.

Further, the City is limited to towing motor vehicles by Revised Statutes of Missouri Section 300.595 which permits towing from streets or highways and not from private

property.

The third issue raised by the Respondent is in relation to the question presented by the Petitioner in his application for a writ. The City has a convenient lapse of memory at this point and has forgotten the evidence presented by the Petitioner in the jury trial. It forgets to tell this Court that the taking of motor vehicles from Petitioner's property had occurred previously, several years before the date in this case (TR1-89). It forgets to tell the Court that after the motor vehicles in this case had been taken it attempted to again illegally take motor vehicles from Petitioner's property (TR1-100). Then Petitioner filed his suit and the vehicles were returned to him.

This suit was filed by Petitioner as a class action not only because Petitioner's motor vehicles were taken illegally, but so

were the vehicles of many other citizens. This is not a sole isolated incident in the city's operations -- it is a daily and systematic operation of illegality that continues and will continue in violation of people's constitutional rights. The only way, therefore, to stop such unconstitutional activities is to grant a Writ of Certiorari to Petitioner or reverse the decision of the Eighth Circuit Court of Appeals. Replevin is not an adequate remedy in this case for Petitioner and others. A declaration that the City's activity in this regard is abusive, illegal and a total disregard of the people's constitutional rights is needed.

To secure one's property immediately back by replevin, a bond must be posted. This would not be an adequate remedy. Why must a person post a bond to receive his property that has been illegally seized? Is this adequacy? It is submitted that to say

that replevin is an adequate remedy for a constitutional violation will be to encourage illegal and unconstitutional actions by the police.

CONCLUSION

For the reasons stated herein and in its original brief and application, Petitioner requests the Court to grant the Writ of Certiorari or in the alternative, that the replevin and order of the Court of Appeals of the Eighth Circuit, State of Missouri, be summarily reversed; or such other and further relief as to this Honorable Court may appear appropriate.

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CERTIFICATE OF SERVICE

I, Louis S. Czech, counsel of record for Ernest Allen, Petitioner, hereby certify that on the 23rd day of October, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for a Writ or Certiorari to the United States Court of Appeals for the Eighth Circuit on Lloyd J. Jordan, 721 Olive Street, St. Louis, MO 63101.

Louis S. Czech